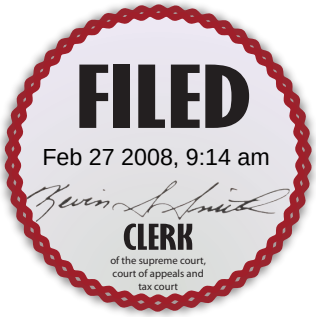


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| HAWK DEVELOPMENT CORP., an Indiana Corporation, | ) | |
| Appellant-Defendant, | ) | |
| vs. | ) | No. 45A03-0706-CV-277 |
| CRAIG VAN PROOYEN and WHITE HAWK COUNTRY CLUB HOME OWNERS ASSOCIATION, INC., an Indiana Corporation, | ) | |
| Appellees-Plaintiffs. | ) | |

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffery J. Dywan, Judge
Cause No. 45D11-0705-PL-53

**February 27, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SHARPNACK, Judge**

Hawk Development Corp. ("Hawk") appeals the trial court's grant of a motion by White Hawk Country Club Home Owners Association Inc. ("HOA") and Craig Van Prooyen for a preliminary injunction against Hawk. Hawk raises five issues, which we revise and restate as:

I. Whether the HOA and Van Prooyen have standing;

II. Whether the trial court's grant of a preliminary injunction was clearly erroneous; and

III. Whether the trial court abused its discretion by granting the preliminary injunction without requiring the HOA and Van Prooyen to post a security bond pursuant to Ind. Trial Rule 65(C).

We affirm.

The relevant facts follow. Hawk was the owner and developer of Phase 3 of White Hawk Country Club. Hawk owns Lot 110 within White Hawk Country Club and an eighteen acre parcel that is not within the White Hawk Country Club or under the control of the HOA.

Hawk obtained approval from the Crown Point "BZA" to build an asphalt driveway through Lot 110 to the eighteen acre parcel, on which Hawk proposed a single family residence. Transcript at 24. Hawk began improvements on Lot 110 including "[s]craping" and placing "[s]urveyor's sticks." Id. at 27. The HOA has an Architectural Control Committee that reviews blueprints submitted by builders or homeowners for construction of new homes to ensure that the requirements of the restrictive covenants are met, but Hawk did not submit plans to the HOA.

The HOA filed a complaint against Hawk for preliminary and permanent injunction for breach of the Declaration of Covenants and Restrictions ("Covenants") applicable to Lot 110. Hawk filed a motion to dismiss for failure to state a claim. The HOA and Craig Van Prooyen, a resident within Hawk Country Club Subdivision and member and president of the HOA, filed an amended complaint against Hawk for preliminary and permanent injunction for breach of the Covenants. Specifically, the HOA and Van Prooyen alleged that Hawk commenced site work on Lot 110 for the sole purpose of constructing a driveway across the entirety of Lot 110 and across a utility easement to access the eighteen acre parcel. The complaint also alleged that Hawk was prohibited from making any improvements to Lot 110 other than a single family residence, and then only after having first obtained written approval from the Architectural Control Committee.

The Covenants state, in pertinent part:

> NOW, THEREFORE, the Owner and Developer hereby declare that all of the property described on Exhibit "A", except Outlots A, B & D shall be held, sold and conveyed subject to the following easements, restrictions, covenants and conditions, all of which are for the purpose of enhancing and protecting the value, desirability, and attractiveness of the property. These easements, restrictions, covenants and conditions shall run with the real estate described in Exhibit "A" as part of a general plan of development and shall be binding on all parties having or acquired any right, title or interest in the property or any part thereof, and shall inure to the benefit of each owner thereof.
>
> ARTICLE I
>
> ARCHITECTURAL CONTROL

No building, improvement, or other structure shall be commenced, erected or maintained on the property and no exterior addition, change or alteration shall be made until the plans, specifications, plot plan showing grading and drainage, and exterior elevations have been submitted to and approved in writing by the developer (Hawk Development Corp.), or its duly authorized agents or assigns as to quality of structure and materials, and harmony of external design with existing structures. The submission so made shall also include the square footage of the proposed improvement.

* * * * *

## ARTICLE II

## USE RESTRICTIONS

A. CONVEYANCE. Each lot shall be conveyed as a separately designated and legally described freehold interest subject to the terms, conditions and provisions hereof.

B. USE. All lots in this addition shall be used for one family residential purposes only.

C. MINIMUM FLOOR AREA. The computation of square footage shall exclude porches, breezeways, garages and basements. All garages shall be attached to the principal residential structure and shall be sized for a minimum of two cars. All construction shall be in accordance with R-1 zoning requirements effective in the City of Crown Point.

* * * * *

D. TYPE OF CONSTRUCTION. No building previously constructed elsewhere shall be moved upon any lot within this subdivision.

E. APPEARANCE.

* * * * *

F. LANDSCAPING REQUIREMENTS. Each front yard and side yard up to the rear of the residential unit and perpendicular thereto shall be sodded. Rear yards may be seeded.

* * * * *

## ARTICLE III

## PROPERTY OWNERS ASSOCIATION

A. NOT-FOR-PROFIT CORPORATION. A Not-for-Profit Corporation shall be created and incorporated for the express purpose of ownership and maintenance of the entrance features, landscaping and decorative street lights, and to ensure the high standards of maintenance and operation of the property in the Subdivision. Every record owner of a fee simple interest in the lots in the Subdivision shall become and be a member of the Not-for-Profit Corporation, and each such member shall be entitled to one (1) vote for each lot owned by him on each matter submitted to a vote of members, provided, that where title to a lot is in more than one (1) name, such co-owners acting jointly shall be entitled to but one (1) vote. Each lot on the Plat of the Subdivision shall be deemed to be a separate lot entitling the Owner thereof to one (1) vote for each lot owned.

* * * * *

## ARTICLE VI
## GENERAL PROVISIONS

* * * * *

B. ENFORCEMENT. The Developer, his heirs, successors and assigns, or any owner of a lot or any mortgagee of property within the subdivision, shall have the right to enforce any provision of this Declaration by any proceeding of law or equity. Any owner found to be in violation by a Court of competent jurisdiction of any provisions of this Declaration shall also be liable for reasonable attorney fees incurred in prosecuting such action and in enforcing the terms and conditions hereof. The failure to enforce any provisions of this Declaration shall in no event be deemed a waiver of the right to do so thereafter. The Developer has no personal liability, obligation or responsibility to enforce the Declaration of Restrictive Covenants, or any part thereof, detailed herein.

* * * * *

Appellant's Appendix at 89-95.

The trial court held a hearing on the preliminary injunction. At the hearing, Todd Kleven, an employee of Hawk, stated that the eighteen acre parcel and Lot 110 were being offered for $600,000 and that negotiations were ongoing but no offer had been signed. Hawk's attorney argued that "[t]heir potential damages, their inability to sell this lot as a result of the preliminary injunction would be the value of the lot as ruled from the market." Transcript at 81. Kleven stated that Hawk would be unable to market the lot if the trial court issued a preliminary injunction. On cross examination, when asked whether Hawk could obtain an easement through Liberty Park, Kleven stated that "a lot of things" could be done. Id. at 83.

After the hearing, the trial court entered the following order:

> The Court, having heard and considered the evidence, now enters the following specific findings of fact:
>
> 1. White Hawk Country Club Home Owners Association, Inc. (Home Owners Association), is an Indiana corporation, and it is the owner of certain outlots in White Hawk Country Club, Phase 3, Blocks 1 and 2, in Crown Point, Indiana.
>
> 2. Craig Van Prooyen is an owner of a residential lot in White Hawk Country Club in Crown Point, Indiana, and, by virtue thereof, is also a member of the Home Owners Association. At present, Van Prooyen serves as President of the Home Owners Association.
>
> 3. Declarations of Covenants and Restrictions have been filed which are applicable to lots in White Hawk Country Club, Phase 3, Blocks 1 and 2, which Declarations were recorded in the Office of the Lake

County Recorder on July 28, 1998. The Declaration of Covenants and Restrictions applies by its terms to all property, except certain outlots, located in White Hawk Country Club, Phase 3, Blocks 1 and 2.

4. The Declaration of Covenants was created for the "purpose of enhancing and protecting the value, desirability, and attractiveness of the property."

5. Hawk Development Corp. (Hawk Development) was the developer of White Hawk Country Club, Phase 3, Blocks 1 and 2, and deeded certain outlots to the Home Owners Association in 2001.

6. The Declaration of Covenants provides for certain standards for buildings and improvements within the subdivision. Specifically Article I deals with architectural control, while Article II deals with use restrictions.

7. Article I provides:

> "No building, improvement, or other structure shall be commenced, erected or maintained on the property and no exterior addition, change or alteration shall be made until the plans, specifications, plot plan showing grading and drainage, and exterior elevations have been submitted to and approved in writing by the developer (Hawk Development Corp.), or its duly authorized agents or assigns as to quality of structure and materials, and harmony of external design with existing structures. The submission so made shall also include the square footage of the proposed improvement.

* * * * *

8. Article II provides:

> "A. CONVEYANCE. Each lot shall be conveyed as a separately designated and legally described freehold interest subject to the terms, conditions and provisions hereof.
>
> "B. USE. All lots in this addition shall be used for one family residential purposes only.

"C. MINIMUM FLOOR AREA. The computation of square footage shall exclude porches, breezeways, garages and basements. All garages shall be attached to the principal residential structure and shall be sized for a minimum of two cars. All construction shall be in accordance with R-1 zoning requirements effective in the City of Crown Point.

"THE FOLLOWING MINIMUM REQUIREMENTS APPLY TO LOTS 105-131 AND 148-164 INCLUSIVE (EXECUTIVE LOTS):

"1.) All one story residential structures shall have a minimum total usable floor area of 2,000 square feet.

"2.) All two story residential structures shall have a minimum total usable floor area of 2,500 square feet.

"3.) The following types of structures will not be permitted: Bi-Levels, Tri-Levels, any type of home constructed on a slab or crawlspace."

9. Several years ago, the Home Owners Association was given the authority to enforce the architectural control standards contained in the Declaration of Covenants by Hawk Development. The precise manner in which this was done has not been shown, but the evidence shows that the Home Owners Association has exercised this authority for some time, not Hawk Development.

10. On February 2, 1998, J.W. Hawk, the incorporator of the Home Owners Association, adopted Bylaws for the Home Owners Association, which Bylaws provided the Home Owners Association could establish committees to perform any functions either as described in the Bylaws or by resolution of the Executive Board of the Home Owners Association.

11. Article V of the Bylaws of the Home Owners Association provides as follows:

"Section 1 – Abatement and Enjoinment of Violations by Members. The violation of any of the Rules and Regulations

adopted by the Executive Board or the breach of any provision of the Instruments, shall give the Executive Board the right, subject to Notice and Hearing, except in the case of an emergency, in addition to any other rights set forth in these Bylaws:

> "(a) to enter the Unit in which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Member, any structure, thing or condition except for additions or alterations of a permanent nature that may exist therein contrary to the intent and meaning of the provisions hereof, and the Executive Board shall not thereby be deemed liable in any manner whatsoever, nor shall such actions constitute an act of trespass; or
>
> "(b) to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such breach."

12. "Instruments" as used in Article V is defined in Article I, Section 1.2(n), to include the Bylaws, Rules and Regulations, as well as the Declaration of Covenants and Restrictions.

13. Hawk Development Corp. is the owner of Lot No. 110 in the subdivision.

14. Hawk Development Corp. is also the owner of an 18-acre parcel lying generally east of Lot 110.

15. Hawk Development Corp. began the construction of a driveway across Lot 110 and continuing east of Lot 110 to gain access to the 18-acre parcel owned by Hawk Development Corp. This work on Lot 110 was begun without obtaining approval of the Architectural Committee formed by the Home Owners Association.

16. This lawsuit was commenced on May 8, 2007.

17. On May 9, 2007, Hawk Development Corp. approved a "plan review for White Hawk Country Club" of the "survey/site plan," for Lot 110 for the purpose of a "single family residence and driveway."

18. Hawk Development intends to construct only a driveway across Lot 110 to provide access to the 18-acre parcel lying east of Lot 110 to facilitate Hawk Development's proposed construction of a residence on the 18-acre parcel which is east of this subdivision.

19. Though a monetary value might be calculated in regards to Plaintiffs' potential loss in values if Hawk Development is allowed to proceed, the desirability and attractiveness of the properties in the subdivision could be affected and the effect would be subjective and difficult to quantify.

20. The threatened harm to Hawk Development if an injunction is granted is minimal since this injunction shall only require Hawk Development to use Lot 110 in the subdivision according to the Declarations of Covenants and Restrictions. Hawk Development may use its land outside the subdivision in any lawful manner as it sees fit.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction both of the parties and the subject matter in this case.

2. Hawk Development, as the owner of Lot 110 in the subdivision, is bound by the terms and conditions of the Declaration of Covenants and Restrictions applicable to the subdivision, and the Bylaws of the Home Owners Association.

3. That Hawk Development was formerly developer of the property does not change its status as an owner, and gives Hawk Development no greater rights than any owner of property within the subdivision as applies to the use of Lot 110.

4. The Home Owners Association, as the owner of outlots within the subdivision, has standing to enforce the Bylaws of the Home Owners Association and the Declaration of Covenants and Restrictions applicable to the subdivision.

5. Craig Van Prooyen, as an owner of a lot within the subdivision, has standing to enforce the Declaration of Covenants and Restrictions applicable to the subdivision.

6. The use restrictions contained in the Declaration of Covenants and Restrictions require that each lot be used for a single family residence only. The restrictions do not permit a lot to be used only for a driveway or access road to adjacent land. The construction of a driveway across Lot 110 by Hawk Development Corp. solely for the purpose of gaining access to other land is a violation of the Declaration of Covenants and Restrictions.

7. Hawk Development assigned the authority for review of plans, specifications, plot plans, grading, drainage, and exterior elevations to the Home Owners Association some years ago. Though the specific manner in which Hawk Development accomplished this transfer has not been demonstrated, it has been shown that the Home Owners Association has for some years performed this function with the knowledge of Hawk Development.

8. Hawk Development's commencement of the building of the driveway without having submitted the plans to the Home Owners Association and without having obtained the Home Owners Association's approval is a violation of the Declaration of Covenants and Restrictions.

9. The Declaration of Covenants and Restrictions, recorded by the Defendant as developer, should be construed as and be binding upon the parties as would be contracts under the law.

10. Because Hawk Development previously acted as developer, and has relinquished control of the architectural review process to the Home Owners Association, Hawk Development is not now exempt from the application of the Declaration of Covenants and Restrictions.

11. Restrictive covenants are generally disfavored and will be strictly construed by the Courts. Restrictive covenants may be enforced by injunctive relief in appropriate cases.

12. The restrictive covenants in this case were drafted by the Defendant and are not violative of public policy. The intent of the covenants can be established by review of the document.

13. The factors to be considered by a Court when determining whether to grant a preliminary injunction are as follows:

    (a) whether the Plaintiff's remedies at law are adequate;
    (b) whether the Plaintiff has demonstrated a reasonable likelihood of success at trial by establishing a *prima facie* case;
    (c) whether the threatened injury to the Plaintiff outweighs the threatened harm the grant of the injunction may inflict on the Defendant; and
    (d) whether the grant of a preliminary injunction would disserve the public interest.

14. A legal remedy is not deemed adequate merely because it exists. Injunctive relief may be granted if it is more practicable, efficient or adequate than the remedy afforded by law.

15. The general purpose of a preliminary injunction is the maintenance and preservation of the status quo until the case can ultimately be heard on the merits. A Court may consider whether one party is more culpable with respect to a violation of restrictive covenants or whether a party's actions are deliberate.

16. The Plaintiffs' remedies at law for the Defendant's conduct in this case are not full and adequate. The Plaintiffs have demonstrated at least a reasonable likelihood of success at trial and have established a *prima facie* case. The threatened injury to the Plaintiffs outweighs the threatened harm to the Defendant if an injunction is granted. The grant of an injunction as requested would not disserve the public interests.

IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiffs' request for a preliminary injunction is hereby GRANTED. Hawk Development Corp., its agents, successors, principals, assigns and persons acting in concert with it are preliminarily enjoined, pursuant to Trial Rule 65, from taking any further action for site preparation or preliminary construction of improvements on

> Lot 110, White Hawk Country Club, Phase 3, Units 1 and 2, in Crown Point, Indiana, contrary to the terms and condition of the Declaration of Covenants and Restrictions. Hawk Development Corp. is specifically enjoined from continuing or attempting to construct improvements upon said Lot 110, which improvements do not include a single family residence upon said lot, and without first having obtained written approval of the plans, specifications, plot plan, grading, drainage and exterior elevations, from the Architectural Review Committee of the White Hawk Country Club Home Owners Association, Inc.

Appellant's Appendix at 10-18. On May 25, 2007, Hawk filed a motion to reconsider. The trial court did not rule on the motion to reconsider and, thus, it was deemed denied. See Ind. Trial Rule 53.4.

I.

The first issue is whether the HOA and Van Prooyen have standing. Hawk argues that "[b]ecause neither Van Prooyen nor the Unit 1 HOA is a party to the Phase 3 Covenants, they are presumed not to have standing to sue on that contract." Appellant's Brief at 12. Standing refers to the question of whether a party has an actual demonstrable injury for purposes of a lawsuit. Hammes v. Brumley, 659 N.E.2d 1021, 1029 (Ind. 1995), reh'g denied. It is a prudential limitation on the ability of individuals to seek redress in our courts. Cablevision of Chicago v. Colby Cable Corp., 417 N.E.2d 348, 352 (Ind. Ct. App. 1981). The main purpose of standing is to insure that the party before the court has a substantive right to enforce the claim that is being made in the litigation. Pence v. State, 652 N.E.2d 486, 487 (Ind. 1995), reh'g denied. Standing remains an essential element in litigation that serves as a check on the exercise of judicial power by Indiana courts and thereby maintains our state constitutional scheme of separation of

powers. Id. at 488. It mandates that courts act in real cases, and refrain when called upon to engage in abstract speculation. Id.

This issue requires us to interpret the enforcement clause of the Covenants. Because covenants are a form of express contract, we apply the same rules of construction. Renfro v. McGuyer, 799 N.E.2d 544, 547 (Ind. Ct. App. 2003), trans. denied. Construction of the terms of a written contract is a pure question of law for the court, and we conduct a de novo review of the trial court's conclusions in that regard. Grandview Lot Owners Ass'n, Inc., v. Harmon, 754 N.E.2d 554, 557 (Ind. Ct. App. 2001), trans. denied.

When courts are called upon to interpret restrictive covenants, they are to be strictly construed, and all doubts should be resolved in favor of the free use of property and against restrictions. Renfro, 799 N.E.2d at 547. The covenanting parties' intent must be determined from the specific language used and from the situation of the parties when the covenant was made. Mayer v. BMR Properties, LLC, 830 N.E.2d 971, 979 (Ind. Ct. App. 2005). Specific words and phrases cannot be read exclusive of other contractual provisions. Id. In addition, the parties' intentions must be determined from the contract read in its entirety. Id. We attempt to construe contractual provisions so as to harmonize the agreement, id., and so as not to render any terms ineffective or meaningless, City of Lawrenceburg v. Milestone Contractors, L.P., 809 N.E.2d 879, 883 (Ind. Ct. App. 2004), trans. denied.

The enforcement clause in the Covenants states that "any owner of a lot . . . shall have the right to enforce any provision of this Declaration by any proceeding of law or equity." Appellant's Appendix at 95. The Covenants do not define the word "lot." The trial court found that the HOA "as the owner of outlots within the subdivision, has standing to enforce the Bylaws of the Home Owners Association and the Declaration of Covenants and Restrictions applicable to the subdivision." Id. at 15.

Hawk argues that the terms of the Covenants demonstrate that the HOA cannot be deemed an "owner of a lot" within the enforcement clause. Specifically, Hawk points out that the Covenants state that "[a]ll lots in this addition shall be used for one family residential purposes only;" "[e]ach lot on the Plat of the Subdivision shall be deemed to be a separate lot entitling the Owner thereof to one (1) vote for each lot owned;" and "[a] yearly fee in the amount of $120.00 shall be assessed to each lot." Id. at 90, 93. Hawk argues that none of these provisions could logically apply to the HOA because outlots cannot be restricted to residential uses. Hawk also argues that it would be illogical for the HOA, as an owner of an outlot, to carry the single vote of a lot owner or to pay association dues to itself.

The Covenants state:

> NOW, THEREFORE, the Owner and Developer hereby declare that all of the property described on Exhibit "A", except Outlots A, B & D shall be held, sold and conveyed subject to the following easements, restrictions, covenants and conditions, all of which are for the purpose of enhancing and protecting the value, desirability, and attractiveness of the property.

Id. at 89. Thus, the restrictions in the Covenants do not apply to the outlots. However, "lot" as used in the enforcement clause is not defined to exclude outlots. Accordingly, we conclude that the trial court did not err when it concluded that the HOA had standing. Because the HOA has standing, we need not address the arguments regarding Van Prooyen's standing. See Penn-Harris-Madison School Corp. v. Joy, 768 N.E.2d 940, 945 n.4 (Ind. Ct. App. 2002) (holding that there was no need to address the standing issue of particular plaintiffs when other named plaintiffs had standing to prosecute the action).

II.

The next issue is whether the trial court's grant of a preliminary injunction was clearly erroneous. The grant or denial of a request for a preliminary injunction rests within the sound discretion of the trial court, and our review is limited to whether there was a clear abuse of that discretion. Ind. Family and Soc. Servs. Admin. v. Walgreen Co., 769 N.E.2d 158, 161 (Ind. 2002). When determining whether to grant a preliminary injunction, the trial court is required to make special findings of fact and state its conclusions thereon. Barlow v. Sipes, 744 N.E.2d 1, 5 (Ind. Ct. App. 2001) (citing Ind. Trial Rule 52(A)), trans. denied. When findings and conclusions thereon are made, we must determine if the trial court's findings support the judgment. Id. We will reverse the trial court's judgment only when it is clearly erroneous. Id. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. Id. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. CSX Transp., Inc. v. Rabold, 691

N.E.2d 1275, 1277 (Ind. Ct. App. 1998), trans. denied. We consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment. Barlow, 744 N.E.2d at 5. Moreover, "[t]he power to issue a preliminary injunction should be used sparingly, and such relief should not be granted except in rare instances in which the law and facts are clearly within the moving party's favor." Id.

To obtain a preliminary injunction, the moving party has the burden of showing by a preponderance of the evidence that: (1) the movant's remedies at law were inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) it had at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) its threatened injury outweighed the potential harm to appellant resulting from the granting of an injunction; and (4) the public interest would not be disserved. Walgreen, 769 N.E.2d at 161. The movant must prove each of these requirements to obtain the preliminary injunction. McGlothen v. Heritage Envtl. Servs., L.L.C., 705 N.E.2d 1069, 1074 (Ind. Ct. App. 1999). Hawk challenges each of these elements.

Before addressing Hawk's arguments, we note that in general, a restrictive covenant is a contract between a grantor and a grantee that restricts the grantee's use of land. Holliday v. Crooked Creek Villages Homeowners Ass'n, Inc., 759 N.E.2d 1088, 1092 (Ind. Ct. App. 2001). "The general purpose of a restrictive covenant is to maintain or enhance the value of adjacent property by controlling the nature and use of surrounding properties." Id. Restrictive covenants are generally disfavored in the law and will be strictly construed by the courts, which resolve all doubts in favor of the free

use of property and against restrictions. Grandview Lot Owners Ass'n, Inc., 754 N.E.2d at 557. Nevertheless, restrictive covenants are a form of express contract recognized under the law. Id. "[B]ecause of their contractual nature, restrictive covenants are enforced as long as the restrictions are unambiguous and do not violate public policy." Holliday, 759 N.E.2d at 1092.

A. Adequate Remedy at Law

The first factor is whether the party seeking the injunction has an adequate remedy at law. To obtain a preliminary injunction, the HOA and Van Prooyen had the burden of showing by a preponderance of the evidence that their remedies at law were inadequate, thus causing irreparable harm pending resolution of the substantive action. Walgreen, 769 N.E.2d at 161. Just because a legal remedy exists does not necessarily mean that it is adequate. Crossmann Cmtys., Inc. v. Dean, 767 N.E.2d 1035, 1041 (Ind. Ct. App. 2002). A trial court may grant injunctive relief if it is more practicable, efficient, or adequate than the remedy afforded by law. Id. at 1042. However, before granting injunctive relief, a trial court must consider alternate remedies available to the plaintiff. Dible v. City of Lafayette, 713 N.E.2d 269, 272 (Ind. 1999). One purpose of a preliminary injunction is to prevent harm to the moving party that could not be corrected by a final judgment. Crossman Cmtys., Inc., 767 N.E.2d at 1042. As such, an injunction will not issue where the law can provide a full, adequate, and complete form of redress. Id. A party suffering "mere economic injury is not entitled to injunctive relief because damages are sufficient to make the party whole." Walgreen, 769 N.E.2d at 162. Although mere economic

injury generally does not warrant the grant of an injunction, the trial court must determine whether the legal remedy is as full and adequate as the equitable remedy. Crossman Cmtys, Inc., 767 N.E.2d at 1041.

Hawk argues that violation of the Covenants is subject to an economic assessment and that the HOA and Van Prooyen's remedies include the forced removal of the driveway. The trial court found:

> 19. Though a monetary value might be calculated in regards to Plaintiffs' potential loss in values if Hawk Development is allowed to proceed, the desirability and attractiveness of the properties in the subdivision could be affected and the effect would be subjective and difficult to quantify.

Appellant's Appendix at 14. The trial court concluded that the plaintiffs' "remedies at law for the Defendant's conduct in this case are not full and adequate." Id. at 17. We note that the Covenants state that any owner of a lot can enforce any provision by any proceeding in law or equity. The Covenants also state that the "easements, restrictions, covenants and conditions" were "for the purpose of enhancing and protecting the value, desirability, and attractiveness of the property," which cannot be quantified in purely economic terms. Id. at 89. We cannot say that the trial court's finding that there is not an adequate remedy at law is clearly erroneous. See, e.g., Robert's Hair Designers, Inc. v. Pearson, 780 N.E.2d 858, 865-867 (Ind. Ct. App. 2002) (holding that losses would warrant a finding of irreparable harm).

B. Reasonable Likelihood of Success on the Merits

The next factor is whether the party seeking the injunction has established a reasonable likelihood of success on the merits at trial. In order to prove a reasonable likelihood of succeeding on the merits, the HOA and Van Prooyen needed to establish a prima facie case through substantial, probative evidence. Ind. High Sch. Athletic Ass'n, Inc. v. Martin, 731 N.E.2d 1, 7 (Ind. Ct. App. 2000), reh'g denied, trans. denied. Substantial evidence is that which is "more than a scintilla and less than a preponderance." Partlow v. Ind. Family & Soc. Servs. Admin., 717 N.E.2d 1212, 1217 (Ind. Ct. App. 1999). Although the HOA and Van Prooyen had to establish a prima facie case, they were "not required to show that [they were] entitled to relief as a matter of law, nor [were they] required to prove and plead a case which would entitle [them] to relief upon the merits." Norlund v. Faust, 675 N.E.2d 1142, 1149 (Ind. Ct. App. 1997), clarified on denial of reh'g, 678 N.E.2d 421, trans. denied. We must therefore determine whether the likelihood of success is so improbable as to render the trial court's determination erroneous as a matter of law. Id.

Hawk argues that there was no violation of the Covenants because the construction of a driveway does not violate the single family residential purpose limitation in the Covenants.[1] Hawk argues that the term "residential purpose" does not necessarily require construction of a residence. Appellant's Brief at 23. Hawk also argues that the HOA and

[1] Hawk also argues that "[t]here was no evidence presented to show that the power to sue to enforce the Phase 3 Covenants was assigned to either plaintiff." Appellant's Brief at 21. We have already addressed the issue of standing. See supra Part I.

Van Prooyen "admitted that the proposed driveway over Lot 110 was a residential driveway." Appellant's Brief at 7. The trial court concluded:

> 6. The use restrictions contained in the Declaration of Covenants and Restrictions require that each lot be used for a single family residence only. The restrictions do not permit a lot to be used only for a driveway or access road to adjacent land. The construction of a driveway across Lot 110 by Hawk Development Corp. solely for the purpose of gaining access to other land is a violation of the Declaration of Covenants and Restrictions.

Appellant's Appendix at 15.

The court in Austin v. Durbin, 160 Ind. App. 180, 310 N.E.2d 893 (1974), confronted a situation in which a developer wished to build a roadway over a lot. In Austin, homeowners in a subdivision sought to enjoin a developer from constructing a roadway through a lot in the subdivision. 160 Ind. App. at 181, 310 N.E.2d at 894. The developer had purchased the lot, together with 28.5 acres adjoining it, from the New Albany Girl Scout Council. Id. The Scouts had used the 28.5 acre tract as a campground, and the lot for ingress and egress thereto on various occasions for a period of eighteen years. Id.

All lots in the subdivision, including the developer's lot, were subject to a number of restrictions including prohibitions against erection of structures other than single family dwellings and provisions establishing setback lines and easement strips for utilities. Id. at 181, 310 N.E.2d at 894-895. "It was further provided that: 'All lots in the tract shall be known and described as residential lots.'" Id. at 181, 310 N.E.2d at 895. The developer subdivided the 28.5 acre tract into sixteen proposed residential lots and

needed the roadway across his for ingress and egress. Id. at 182, 310 N.E.2d at 895. The trial court granted a permanent injunction, which enjoined the developer from "constructing a roadway across or over any portion of [his lot in the subdivision] or from using said lot for any purpose except residential." Id.

On appeal, the developer argued that the restrictions did not expressly prohibit the building of a roadway and that the restriction that the property be used only for residential purposes is not violated by its use as a means of access to an adjoining tract. Id. at 185, 310 N.E.2d at 896. In affirming the permanent injunction against the developer, this court considered: (1) that the developer's lot was on a cul-de-sac, which suggested it was not intended for through traffic; (2) the size of the access strip; (3) whether the access strip was connected to another street; and (4) whether the same restrictions applicable to the subdivision lot would be imposed upon the lot outside the subdivision. 160 Ind. App. at 185-186, 310 N.E.2d at 896-897. This court held that:

> [C]ourts are inclined to hold that the maintenance, use, or grant of a right of way across property restricted in its use is a violation of the restriction if such maintenance, use, or grant seems to be inconsistent with the parties' intention in creating or agreeing to the restriction and with the object sought to be thereby accomplished, while if it does not interfere with the carrying out of the parties' intention and the purpose of the restriction, it will not be held to be a violation.

Id. at 186, 310 N.E.2d at 897 (quoting V. Woerner, Annotation, *Maintenance, Use, or Grant of Right of Way Over Restricted Property As Violation of Restrictive Covenant* 25 A.L.R.2d 904, 906 (1952)). This court concluded that the evidence suggested that the

proposed roadway was inconsistent with the intention to restrict the lots in the subdivision to residential purposes. Id. at 186-187, 310 N.E.2d at 897.

Here, the Covenants state that "[a]ll lots in this addition shall be used for one family residential purposes only." Appellant's Appendix at 90. The Covenants contain requirements regarding the minimum floor area, types of construction, and appearance of residences. The Covenants also state that "[e]ach front yard and side yard up to the rear of the residential unit and perpendicular thereto shall be sodded." Id. at 91. The construction of an asphalt driveway across the entirety of Lot 110 to connect to the eighteen acre parcel, which is a vacant piece of property and not within the White Hawk Country Club or under the control of the HOA, appears inconsistent with the parties' intention in creating the Covenants and the object sought to be accomplished by the Covenants. Thus, we cannot say that the trial court's conclusion that the HOA and Van Prooyen established at least a reasonable likelihood of success on the merits at trial is clearly erroneous.[2] See, e.g., Ind. State Bd. of Pub. Welfare v. Tioga Pines Living Ctr.,

[2] Hawk also argues that there was no violation of the Covenants because the written documents established that Hawk retains the power of architectural review under the terms of the Covenants. The Covenants state:

> ARTICLE I
> ARCHITECTURAL CONTROL
>
> No building, improvement, or other structure shall be commenced, erected or maintained on the property and no exterior addition, change or alteration shall be made until the plans, specifications, plot plan showing grading and drainage, and exterior elevations have been submitted to and approved in writing by the developer (Hawk Development Corp.), or its duly authorized agents or assigns as to quality of structure and materials, and harmony of external design with existing structures. The submission so

Inc., 637 N.E.2d 1306, 1315 (Ind. Ct. App. 1994) (affirming the trial court's finding that the plaintiff demonstrated a reasonable likelihood of success on the merits), reh'g denied.

C. Balance of Hardships

The next factor is whether the injury to the party seeking the injunction outweighs the harm to the party to be enjoined. When considering the balance of harms analysis the trial court must weigh the harm to the defendant if the injunction is issued against the harm to the plaintiff if the injunction is denied. Gaskin v. Beier, 622 N.E.2d 524, 527 (Ind. Ct. App. 1993), trans. denied. The trial court found:

> 19. Though a monetary value might be calculated in regards to Plaintiffs' potential loss in values if Hawk Development is allowed to proceed, the desirability and attractiveness of the properties in the subdivision could be affected and the effect would be subjective and difficult to quantify.
>
> 20. The threatened harm to Hawk Development if an injunction is granted is minimal since this injunction shall only require Hawk Development to use Lot 110 in the subdivision according to the Declarations of Covenants and Restrictions. Hawk Development may use its land outside the subdivision in any lawful manner as it sees fit.

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made shall also include the square footage of the proposed improvement.

Appellant's Appendix at 89. Even assuming that Hawk retained power of architectural review, the Covenants do not state that the power of architectural review includes the power to approve an improvement or structure that violates the Covenants. Thus, we do not find the issue of whether Hawk retained architectural review dispositive.

Appellant's Appendix at 14-15. The trial court concluded that "[t]he threatened injury to the Plaintiffs outweighs the threatened harm to the Defendant if an injunction is granted." Id. at 17.

Hawk argues that the HOA suffers no injury if the injunction does not issue because a trial court has the power to issue a mandatory injunction for its removal. Hawk also argues that it is bearing the expense of owning the eighteen acre parcel without any use of that lot and would potentially lose that sale by the grant of the injunction in this case. However, Kleven indicated that a lot of things could be done to access the eighteen acre parcel. We cannot say that the trial court's finding that the threatened injury to the HOA and Van Prooyen outweighs the threatened harm to Hawk is clearly erroneous. See Hacienda Mexican Rest. Of Kalamazoo Corp. v. Hacienda Franchise Group, Inc., 569 N.E.2d 661, 670 (Ind. Ct. App. 1991) (holding that the trial court's finding that the balance of harms favored the preliminary injunction was not clearly erroneous), trans. denied.

D. Public Interests

The last factor is whether granting the injunction would disserve the public interest. The effect of the injunction upon the public interest must be weighed with the relative potential harms to the parties. Id. at 666. Where an injunction is sought which would adversely affect a public interest, the court may in the public interest withhold relief until a final determination of the rights of the parties, although postponement may

be burdensome to the plaintiff. Fumo v. Medical Group of Michigan City, Inc., 590 N.E.2d 1103, 1108 (Ind. Ct. App. 1992), reh'g denied, trans. denied.

The trial court concluded that "[t]he grant of an injunction as requested would not disserve the public interests." Appellant's Appendix at 17. Hawk argues that the public interest weighs in favor of the free use of property and against restrictions on individuals' use of private property. Hawk also argues that "[i]n light of the scant proof that legal remedies are inadequate, the marginal likelihood of success at trial, the absence of harm to the Unit 1 HOA by denying the injunction, and the substantial potential for harm to Hawk Development from granting the injunction, an injunction would disserve the public interest in allowing the free use of private property." Appellant's Brief at 25. The HOA and Van Prooyen argue that the Hawk's contention ignores the clear intent of recorded restrictions and that restrictive covenants can serve a public interest.

A restrictive covenant is "a contract between two parties setting forth certain restrictions upon the use and occupancy of land for consideration." Bob Layne Contractor, Inc. v. Buennagel, 158 Ind.App. 43, 53, 301 N.E.2d 671, 678 (Ind. Ct. App. 1973). The purpose of a restrictive covenant is "to maintain or enhance the value of lands appurtenant to one another by controlling the nature of the surrounding lands and the uses to which they are put." Id. There is no evidence that the public interest would be disserved by the injunction. We cannot say that the trial court's finding that the public interest would not be disserved is clearly erroneous. See, e.g., Tioga Pines Living Ctr.,

Inc., 637 N.E.2d at 1318 (affirming the trial court's finding that the public interest is threatened and would be disserved if the injunction had not issued).

In summary, we conclude that: (1) the HOA and Van Prooyen had no adequate remedy at law; (2) the HOA and Van Prooyen established a reasonable likelihood of success on the merits at trial; (3) the HOA and Van Prooyen's potential injury if the preliminary injunction was not granted outweighed Hawk's injury if the preliminary injunction was granted; and (4) granting the injunction would not disserve the public interest. Accordingly, the trial court did not err by issuing the preliminary injunction enjoining Hawk from taking further action on Lot 110 inconsistent with the Covenants.

III.

The next issue is whether the trial court abused its discretion by granting the preliminary injunction without requiring the HOA and Van Prooyen to post a security bond pursuant to Ind. Trial Rule 65(C). Ind. Trial Rule 65(C) states, in pertinent part:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Hawk argues that a bond was required because Hawk "has claimed significant damages from the prohibition against using its property." Appellant's Brief at 25.

The fixing of the amount of the security bond is a discretionary function of the trial court and is reversible only for an abuse of that discretion. Kennedy v. Kennedy, 616 N.E.2d 39, 43 (Ind. Ct. App. 1993). When assessing the amount of security, the trial

court should consider not only the estimated damages offered by the parties but its own experience and knowledge. Id.

The trial court found that Hawk could "use its land outside the subdivision in any lawful manner as it sees fit." Appellant's Appendix at 15. At the hearing, Kleven, an employee of Hawk, stated that the eighteen acre parcel and Lot 110 were being offered for $600,000 and that negotiations were ongoing but no offer had been signed. Kleven stated that Hawk would be unable to market the lot if the trial court issued a preliminary injunction. However, on cross examination of Kleven, the following exchange occurred:

> Q . . . Why cannot the 18 acres be accessed from Royal Hawk Subdivision?
>
> A Due to wetlands, flood plain, et cetera.
>
> Q Why can it not be accessed through Liberty Park?
>
> A We do not have adjacent property to a public right-of-way.
>
> Q But you can obtain an easement, potentially, couldn't you?
>
> A You could do a lot of things.

Transcript at 83. The trial court implicitly rejected the damages of a lost sale. Consequently, we cannot say that the trial court abused its discretion by failing to order the HOA and Van Prooyen to post a bond. See, e.g., Crossman Communities, Inc., 767 N.E.2d at 1043 (holding that the trial court implicitly rejected proposed damages and did not abuse its discretion by failing to order movant to post a bond).

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

FRIEDLANDER, J. and RILEY, J. concur